

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 6

IN THE MATTER OF:

FALCON REFINERY SITE

SAN PATRICIO COUNTY, TEXAS

NATIONAL OIL AND RECOVERY CORPORATION  
(NORCO)

Respondent

U.S. EPA Region 6

CERCLA Docket No. 06-04-04

Proceeding Under Sections 104, 106(a), 107 and 122 of  
the Comprehensive Environmental Response,  
Compensation, and Liability Act, as amended, 42 U.S.C.  
§§ 9604, 9606(a), 9607 and 9622

ADMINISTRATIVE ORDER ON CONSENT FOR REMOVAL ACTION

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## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and National Oil and Recovery Corporation, (“Respondent”). This Order provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the Falcon Refinery Site located in Ingleside, San Patricio County, Texas 1.7 miles southeast of State Highway 361 on FM 2725 at the northwest and southeast corners of FM 2725 and Bishop Road (the “Site”).

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (“CERCLA”). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (1987); further delegated to Regional Administrators by EPA Delegation No. 14-14-C (September 13, 1987); and redelegated by the Regional Administrator to the Director, Superfund Division, by EPA Delegation Nos. R6-14-14-A, 14-14- C and 14-14-D (June 8, 2001).

3. EPA has notified the State of Texas (the “State”) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and the Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon the Respondent, its agents, successors, and assigns. The Respondent is responsible for carrying out all actions required of it by this Order. The signatories certify that they are authorized to execute this Order and legally bind the parties they represent to this Order. Any change in ownership or corporate status of the Respondent or the Site, including any transfer of assets, will not alter the Respondent’s responsibilities under this Order.

6. The Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. The Respondent shall be responsible for any noncompliance with this Order.

### **III. DEFINITIONS**

7. Unless otherwise expressly provided herein, terms used in this Order, which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "Action Memorandum" shall mean the EPA Action Memorandum relating to the Site signed on August 12, 2003, by the Director of the Superfund Division. The Action Memorandum is attached as Appendix A.

b. "ARARs" mean all applicable local, state, and Federal laws and regulations, and all "applicable" or "relevant and appropriate" requirements as those terms are defined at 40 C.F.R. § 300.5 and 42 U.S.C. §9621(d).

c. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 to 9675.

d. "Day" means a calendar day unless expressly stated to be a business or working day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day not a Saturday, Sunday, or Federal holiday.

e. "Effective Date" shall mean be the effective date of this Order as provided in Section XXXII.

f. "EPA" means the United States Environmental Protection Agency and any successor departments or agencies of the United States.

g. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in providing oversight, including, reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, the costs incurred pursuant to Paragraph 41 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), and Paragraph 52 (emergency response), and Paragraph 76 (work takeover). Future Response Costs shall also include all Interim Response Costs.

h. "Hazardous Substance" shall mean any substance defined in Section 311(a)(14) of the Clean Water Act, 33 U.S.C. §1321 (a)(14) and any substance defined pursuant to CERCLA, 42 U.S.C. §9601(14).

i. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

j. "Interim Response Costs" shall mean all costs, including direct and indirect costs, a) paid by the United States in connection with the Site between February 28, 2001 and the Effective Date, or b) incurred prior to the Effective Date, but paid after that date.

k. "National Contingency Plan" or "NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated under Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.

l. "Order" means this Administrative Order on Consent, all other attachments to this document and other documents incorporated by reference into this document, and any EPA-approved submissions required under the terms of this document.

m. "Paragraph" means a portion of this Order identified by an Arabic numeral followed by a period.

n. "Parties" shall mean EPA and Respondent.

o. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through August 31, 2003, plus Interest on all such costs through such date.

p. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

q. "Requirements of this Order" or a similar term means: payments that Respondent is to make under this Order; Work that Respondent is to perform under this Order; scheduled deadlines that Respondent is to meet under this Order, including deadlines in schedules in EPA-approved submissions; and any other obligation of Respondent under this Order. It is a violation of this Order for Respondent to fail to perform a requirement of this Order.

r. "Respondent" means National Oil and Recovery Corporation, a Delaware corporation.

s. "Section" means a portion of this Order identified by a Roman numeral and includes one or more paragraphs.

t. "Site" shall mean the Falcon Refinery Site, encompassing approximately 104 acres including a dock facilities and associated piping and depicted generally on the site map attached as Appendix B.

u. "State" means the State of Texas, and Texas Commission on Environmental Quality. and any successor departments or agencies of Texas.

v. "TCEQ" means the Texas Commission on Environmental Quality.

w. "Waste Material" means 1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601 (14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601 (33); 3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903 (27); and 4) any "hazardous industrial waste" as defined under 30 TAC § 335.1.

x. "Work" means all activities Respondent is required to perform under this Order.

#### IV. FINDINGS OF FACT

8. Respondent is known as National Oil Recovery Corporation (NORCO), a corporation incorporated under the laws of Delaware.

9. The Site occupies approximately 104 acres and is located 1.7 miles southeast of State Highway 361 near the intersection of FM 2725 and Bishop Road near Ingleside, Texas. Ingleside is located approximately 18 miles northeast of Corpus Christi. The Site lies approximately five feet above sea level. The geodetic coordinates of 27°51'38.61" north latitude and 97°10'45.50" west longitude (taken from the U.S. Geological Survey, Port Ingleside Quadrangle, 7.5 Minute Series Map [1975]) represent the entrance to the main process area and were measured from the entrance on Bishop Road.

10. The Site consists of an abandoned refinery that was operated intermittently since 1980. The Respondent has never operated the refinery. During peak operations, previous owners operated the refinery at a 40,000 barrels per day capacity with primary products consisting of naphtha, jet fuel, kerosene, diesel, and fuel oil. The refinery processed material that consisted not only of crude oil but also hazardous substances.

11. The Site is located in the San Antonio-Nueces Coastal Basin adjacent to Redfish Bay, which connects Corpus Christi Bay to the Gulf of Mexico. Surface water drainage from the Site enters the wetlands along the southeastern section of the abandoned refinery. A culvert connects the on-site palustrine/estuarine wetlands to estuarine wetlands. The wetlands then connect to the Intracoastal Waterway and Redfish Bay. The Site is bordered by wetlands to the northeast and southeast, residential areas to the north and southwest, an abandoned refinery to the northwest, and a construction company to the southwest.

12. The Facility is secured with fencing. The Facility is not manned but the lease operators are periodically on-site operating the leased tanks. There are no locks on tank valves, resulting in the potential for a release due to vandalism. The refinery is abandoned and in a state of deterioration, with heavy corrosion and rust evident. High weeds are abundant throughout the Site, increasing the potential for grass fires, which in turn could spread throughout the facility, igniting the materials within the tanks and other containers and exposing the population. The Site is located less than 500 feet from the nearest residential property. Additionally, a wetland is located on the southeast portion of the Site and drains into Redfish Bay.

13. There have been limited investigations conducted on the Site to determine the exact nature of the oils and hazardous substances in bulk and miscellaneous containers, piping and equipment present on-site.

14. In May 2000, the Texas Natural Resource Conservation Commission (now known as the Texas Commission on Environmental Quality) conducted sampling activities at the Site and documented the following hazardous substances: cyclohexane, methcyclohexane, toluene, ethylbenzene, xylenes (totals), fluoranthene, pyrene, benzo(a)anthracene, chrysene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(a)pyrene, ideno(1,2,3-cd)pyrene, benzo(g,h,i)perylene, aluminum, arsenic, barium, cadmium, chromium, copper, lead, manganese, mercury, nickel, selenium, thallium, vanadium, and zinc.

15. The findings of an Expanded Site Inspection, completed in November 2000, revealed potential releases from the Site of the following hazardous substances: fluoranthene, pyrene, benzo(a)anthracene, chrysene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(a)pyrene, ideno(1,2,3-cd)pyrene, benzo(g,h,i)perylene, dibenz(a,h)anthracene, barium, manganese, and mercury. In addition, it is believed that the following hazardous wastes are present on the Site: K048, K049, K051, F037, F038, and K169 and D002. All of the hazardous wastes and substances are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and 40 CFR § 302.4.

16. Sediments in the Redfish Bay, contiguous wetlands and on-site soils may be affected by releases from the Site. The following hazardous substances were documented in sediments obtained in Redfish Bay and nearby wetlands at elevated concentrations that require further investigation: fluoranthene, pyrene, benzo(a)anthracene, chrysene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(a)pyrene, ideno(1,2,3-cd)pyrene, benzo(g,h,i)perylene, barium, manganese, and mercury.

17. The hazardous substances, identified in Paragraphs 14, 15 and 16 above, under certain conditions of dose, duration, or extent of exposure, may produce adverse health and



environmental effects. The following is a list of some of these hazardous substances and associated exposure effects:

**Arsenic** – Arsenic can damage many tissues, including the nerves, stomach and intestines, and skin. Low levels of exposure to inorganic arsenic may cause nausea, vomiting, and diarrhea; decreased production of red and white blood cells; abnormal heart rhythm; and blood vessel damage. Ingesting inorganic arsenic increases the risk of skin cancer and tumors of the bladder, kidney, liver, and lung. Arsenic is a known human carcinogen. Breathing inorganic arsenic increases the risk of lung cancer.

**Benzo(a)anthracene** – This chemical is a probable human carcinogen that can produce tumors in mice exposed by gavage; intraperitoneal, subcutaneous or intramuscular injection; and topical application. This chemical produced mutations in bacteria and in mammalian cells, and transformed mammalian cells in culture.

**Benzo(a)pyrene** – This chemical is a probable human carcinogen. There are multiple animal studies in many species demonstrating that this chemical is carcinogenic following administration by numerous routes. This chemical has produced positive results in numerous genotoxicity assays.

**Benzo(b)fluoranthene** – This chemical is a probable human carcinogen that can produce tumors in mice after lung implantation, intraperitoneal or subcutaneous injection, and skin painting.

**Benzo(k)fluoranthene** – This chemical is a probable human carcinogen that can produce tumors after lung implantation in mice and when administered with a promoting agent in skin-painting studies. Equivocal results have been found in a lung adenoma assay in mice. This chemical is mutagenic in bacteria.

**Cadmium** – Long-term exposure to low levels of cadmium in air, food, or water can lead to a build up of cadmium in the kidneys and possible kidney disease. Other potential long term effects are lung damage and fragile bones. Cadmium is classified as a probable human carcinogen.

**Chromium** – The most common forms of chromium are chromium(0), chromium(III), and chromium(VI). Chromium(VI) is more toxic than chromium(III). Long-term exposures to high or moderate levels of chromium(VI) can damage the nose (bleeding, itching, sores) and lungs, and it can increase the risk of lung cancer. Skin contact with liquids or solids containing chromium(VI) may lead to skin ulcers. Chromium(VI) is a known human carcinogen.

**Chrysene** – Chrysene is a probable human carcinogen that can produce carcinomas and malignant lymphoma in mice after intraperitoneal injection and skin carcinomas in mice following dermal exposure. This chemical can produce chromosomal abnormalities in hamsters and mouse germ cells after gavage exposure, positive responses in bacterial gene mutation assays, and transformed mammalian cells exposed in culture.

**Copper** – Long-term exposure to copper dust can irritate the nose, mouth, and eyes, and cause headaches, dizziness, nausea, and diarrhea. Ingestion of higher than normal levels of copper may cause vomiting and stomach cramps. Very young children are sensitive to copper, and long-term exposure to high levels of copper in food or water may cause liver damage and death.

**Ethylbenzene** – Exposure to ethylbenzene can cause liver, kidney and developmental toxicity.

**Fluoranthene** – Exposure to fluoranthene can cause nephropathy (any functional or morphologic change in the kidney produced by an ingested, injected, inhaled, or absorbed chemical or biologic agent), increased liver weights, hematological alterations, and clinical effects.

**Ideno(1,2,3-cd)pyrene** – This chemical is a probable human carcinogen produce tumors in mice following lung implants, subcutaneous injection, and dermal exposure. This chemical tested positive in bacterial gene mutation assays.

**Lead** – Lead can affect almost every organ and system in the body. The most sensitive is the central nervous system, particularly in children. Lead also damages kidneys and the immune system. Exposure to lead is more dangerous for young and unborn children. Harmful effects include premature births, smaller babies, decreased mental ability in the infant, learning difficulties, and reduced growth in young children. These effects are more common after exposure to high levels of lead. In adults, lead may decrease reaction time, cause weakness in fingers, wrists, or ankles, and possibly affect the memory. Lead may cause anemia. It can cause abortion and damage the male reproductive system. Lead is classified as a probable human carcinogen.

**Mercury** – Methylmercury builds up in the tissues of fish. Larger and older fish tend to have the highest levels of mercury. A person may be exposed to mercury by eating fish or shellfish contaminated with methylmercury. The human nervous system is very sensitive to

all forms of mercury. Methylmercury and metallic mercury vapors are more harmful than other forms, because more mercury in these forms reaches the brain. Exposure to high levels of metallic, inorganic, or organic mercury can permanently damage the brain, kidneys, and developing fetus. Effects on brain functioning may result in irritability, shyness, tremors, changes in vision or hearing, and memory problems. Short-term exposure to high levels of metallic mercury vapors may cause effects including lung damage, nausea, vomiting, diarrhea, increases in blood pressure or heart rate, skin rashes, and eye irritation. The EPA has determined that mercuric chloride and methylmercury are possible human carcinogens.

**Pyrene** – Exposure to pyrene can cause kidney effects (renal tubular pathology, decreased kidney weights).

**Toluene** – Exposure to toluene can cause changes in liver and kidney weights.

**Zinc** – Ingestion of large amounts of zinc over time can cause anemia, pancreas damage, and lower levels of high density lipoprotein cholesterol. Irritation was also observed on the skin of rabbits, guinea pigs, and mice when exposed to some zinc compounds.

**Xylenes** – Exposure to xylenes can cause hyperactivity, decreased body weight, and increased mortality (males).

18. Based on the administrative record for the Site, on August 12, 2003, the EPA Region 6 Superfund Division Director approved an Action Memorandum that included a finding that actual or threatened releases of hazardous substances, pollutants or contaminants from the Site, if not addressed by implementing the response action selected in the Action Memorandum, will continue to present an imminent and substantial endangerment to public health or welfare or the environment. The removal action described in the Action Memorandum involves the removal and disposal of source materials, and may include the demolition of some tanks, piping, and equipment in order to effectuate this activity.

19. The owner of the facility, the Respondent, is currently conducting a cleanup action to remove and dispose of waste from the tanks, equipment, and piping along with demolition of parts of the facility. EPA is aware of this voluntary action and has been working with the Respondent to address the Site. The removal AOC will formalize the actions being taken independently by the Respondent.

20. The Site has been proposed to the National Priorities List (NPL), 40 C.F.R. Part 300, App. B., in accordance with Section 105 of CERCLA, 42 U.S.C. § 9605 (National Priorities List for Uncontrolled Hazardous Waste Sites; Proposed Rule No. 38; Federal Register Vol. 67;

No. 172; Thursday, September 5, 2002). On November 1, 2002, the Respondent submitted comments in opposition to the proposal to list the Site on the NPL, requesting that the Site not be placed on the NPL and stating that it be allowed to negotiate an administrative order with Region 6 according to the requirements of the Superfund alternative sites memorandum issued by the EPA on June 24, 2002. EPA and Respondent have reached a settlement concerning the remedial investigation and feasibility study for the Site in accordance with the requirements of the Superfund alternatives site memorandum.

## V. CONCLUSIONS OF LAW AND DETERMINATIONS

21. The Site is a “facility” as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

22. Materials at the Site and disposed of at the Site, including the materials described in Paragraphs 14 - 17, and the constituents thereof, include “hazardous substances” as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

23. The presence of hazardous substances at the Site, and the past, present or potential movement of hazardous substances at or emanating from the Site, constitute actual and/or threatened “releases” as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

24. The Respondent, National Oil and Recovery Corporation, (NORCO ), is a “person” as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

25. NORCO is a potentially responsible party under Sections 104, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9622. NORCO is the current owner and operator of the Site.

26. Historical facility operations at the Site have caused the release of hazardous substances into the environment.

27. The conditions described in the Findings of Fact above, paragraphs 8 through 20 constitute an actual or threatened “release” of a hazardous substance from the facility as defined by sections 101(22) of CERCLA, 42 U.S.C. § 9601(22).

28. The conditions present at the Site may constitute an imminent and substantial endangerment to public health, welfare, or the environment. The factors include, but are not limited to, the following:

- a. Residential properties are located less than 500 feet northwest and west of the Site where hazardous substances are stored in deteriorating tanks, piping, and

equipment. The Site is only manned periodically by the operators leasing tankage for oil storage. A release and exposure could occur through the overflow of the tanks due to rainfall, tank failure, equipment failure, or vandalism. These overflows may enter roadside ditches which could enter a wetland and may ultimately end up in Redfish Bay. Actions required by this Order are necessary to protect the public health or welfare or the environment, or are in the public interest (42 U.S.C. § 9622(a)), are consistent with CERCLA and the NCP (42 U.S.C. §§ 9604(a)(1), 9622(a)), and will expedite effective remedial action and minimize litigation (42 U.S.C. § 9622(a)).

- b. According to the Preliminary Assessment prepared on December 14, 1987, there are no drinking water wells within 1/4 mile of the facility. There does not appear that drinking water supply wells will be impacted as a result of groundwater contamination. This will be evaluated further under the RI/FS process.
- c. There are hazardous substances in some tanks. Some of the onsite tanks have been minimally maintained since 1990 and are in a state of deterioration. A release could occur through the overflow of the tanks due to rainfall, tank failure, equipment failure, vandalism, or fire.
- d. The samples taken in association with the Hazard Ranking System (HRS) evaluation in May 2000 did not appear to be significantly elevated for impact on human health. The HRS evaluation did show contaminants similar to the contaminants located on-site that appear to have migrated off-site into wetlands and Redfish Bay at concentrations that may impact the environment. A more thorough investigation of on-site and off-site soil and sediment will be conducted as part of any RI/FS process.
- e. The Site is an abandoned facility, except for the two (2) operators that are leasing various tanks. The Site is only manned periodically. The tanks, piping, and equipment are deteriorating. Lightning strikes, heavy rains or corrosion could rupture tanks and result in a release of hazardous substances into the nearby drainage ditches, wetlands, and Redfish Bay. Additionally, tanks and secondary containment are being minimally maintained and inspected, thereby increasing the likelihood of a release offsite and into the drainage system.
- f. The Site is minimally maintained. There are high weeds in and around the facility which, when dry, could result in grass fires at this unsecured facility. A lightning strike or simple arson involving the weeds may also cause a serious fire. A resulting fire could force the release of hazardous substances from the facility to the drainage system or atmosphere. A release of hazardous substances might cause the evacuation

of nearby residents, potential exposures that may be harmful to human health and the environment, and contamination of the environment.

- g. The EPA will coordinate with the state and local government on this response action.
- h. Failure to address the hazardous substances may result in a more significant off-site migration of these substances and materials, thereby creating a larger and more costly response action, and posing a greater impact on human health, welfare, or the environment.
- i. On the southeast portion of the Site there is a wetland which eventually flows into Redfish Bay. Additional releases from this Site could result in a release to the wetland which drains into Redfish Bay. A release of hazardous substances from this Site could, therefore, impact the ecosystem of this drainage pathway.

29. The actual or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

30. The removal actions required by this Order are necessary to protect the public health, welfare, or the environment, and are not inconsistent with the NCP and CERCLA.

## **VI. ORDER**

31. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR**

32. The Respondent is currently conducting a cleanup action to remove and dispose of waste from the tanks, equipment, and piping along with some demolition of the facility. EPA is aware of this voluntary action by the Respondent, and has been working with Respondent to address the Site. The Respondent shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within 30 days of the effective date of this Order. Respondent shall submit the designated Project Coordinator's name, address, telephone number, and qualification. To the greatest extent possible, the Project

Coordinator shall be present on Site or readily available during Site work. Respondent has designated as its Project Coordinator:

Stephen Halasz  
BNC Engineering, LLC  
607 River Bend Drive  
Georgetown, TX 78628  
(512) 930- 1535 ext. 223  
(512) 930- 1535 (fax)  
[shalasz@bnceng.com](mailto:shalasz@bnceng.com)

33. The EPA has designated Mr. Gary W. Moore of the Emergency Response and Prevention Branch, as its On-Scene Coordinator (OSC). Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to the OSC by certified mail, return receipt requested to:

Mr. Gary W. Moore  
Emergency Response and Prevention Branch (6SF-R2)  
United States Environmental Protection Agency, Region 6  
1445 Ross Avenue  
Dallas, Texas 75202-2733  
(214) 665-6609 (phone)  
(214) 665-6660 (fax)  
[moore.gary@epa.gov](mailto:moore.gary@epa.gov)

34. EPA and Respondent shall have the right, subject to Paragraph 35, to change their respective designated OSC or Project Coordinator. Respondent shall notify EPA within 7 days before such a change is made. The initial notification of a change in Respondent's Project Coordinator may be orally made, but it shall be promptly followed by a written notice.

35. Should Respondent elect to change contractors, Respondent shall notify EPA of the name(s) and qualification(s) of any different contractor within 14 days prior to the commencement by the different contractor of Work under this Order. EPA retains the right to disapprove of any and all contractor(s) retained by Respondent. If Respondent elects to change contractors, and EPA disapproves of the different contractor, Respondent shall retain yet another contractor and shall notify EPA of that contractor's name and qualifications within five (5) business days following EPA's disapproval.

36. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondent.

37. Respondent shall submit 3 copies of all plans, reports or other submissions required by this Order or any approved Work Plan. Respondent shall submit such documents in electronic form (Adobe® PDF format).

## VIII. WORK TO BE PERFORMED

38. The Respondent shall perform, at a minimum, all actions necessary to implement the Order of Work. The actions to be implemented generally include, but are not limited to, the following:

### a. The Work

The intent of this action is to remove and dispose of source materials from tanks and other miscellaneous containers, equipment, piping and buildings. This also includes the removal of any source materials in piping associated with transfer or materials to the facility docks or former facility docks. As a result, it may be necessary to demolish or otherwise remove some tanks, piping, equipment, and buildings in order to effectuate this activity. This action may also include the consolidation of materials in onsite tankage for future disposal. If the Respondent elects to consolidate and temporarily store these materials, Respondent must comply with all applicable laws including storage and spill prevention regulations. The work includes:

i. Asbestos Inspection and Abatement: The Respondent shall comply with applicable law(s) to address any asbestos and coordinate its handling appropriately with any demolition activities. Therefore, it will be necessary for the Respondent to conduct an asbestos inspection and make appropriate notifications for the conduct of such demolition and asbestos abatement activities as required by applicable law(s).

ii. Assessment and Removal of Hazardous Substances, or Pollutants or Contaminants: The Respondent shall conduct tests and properly classify the wastes for appropriate disposal or recycling.

iii. Decontamination of Containers, Equipment, Piping, and Buildings: The Respondent shall decontaminate all containers, equipment, piping, and buildings to the extent necessary for the purpose of recycling, reuse, or disposal.

iv. Removal of Containers, Equipment, Piping, and other Contaminated Items: The Respondent shall recycle or dispose of containers, equipment, piping, and other potentially contaminated items in accordance with applicable law(s). The metal debris associated with the removal of the containers, equipment, piping, and other items should be recycled to the extent practical.



v. Consolidation, Removal and Disposal of Grossly Contaminated Soil: The Respondent shall consolidate and then treat or dispose of visibly contaminated surface soils identified during the conduct or resulting from the conduct of this action.

b. Compliance Milestones

The Respondent will prepare and submit a draft Work Plan for review and approval by EPA within 30 day(s) of the effective date of the Order. The draft Work Plan shall describe the technical work to be conducted during this removal action. This draft Work Plan shall include a health and safety plan and a quality assurance sampling plan to address the health and safety and sampling procedures relative to this cleanup.

i. The technical work to be conducted is identified in the Action Memorandum dated August 12, 2003 and includes the following items: asbestos inspection and abatement activities, as necessary; assessment and removal/disposal of hazardous substances, and/or pollutants and contaminants; decontamination of containers, equipment, piping, and buildings; removal/disposal or recycle of some tanks and miscellaneous containers, equipment, piping, buildings and items determined necessary; and, consolidation, removal/disposal of visibly contaminated soil.

ii. The health and safety plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondent shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

iii. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National

Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements.

iv. Upon request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

v. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than 5 days in advance of any sample collection activity, unless, the EPA agrees to a shorter notice. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent’s implementation of the Work.

c. Review and Approval of Workplan

i. After submission of the draft Work Plan, EPA will review the draft Work Plan, and may approve, disapprove, require revisions to, or modify the draft Work Plan in whole or in part. If EPA requires revisions, Respondent must submit a revised draft Work Plan incorporating into the text EPA’s required revisions within 15 days of receipt of EPA’s notification of the required revisions. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Order.

ii. Respondent will implement removal actions in the Work Plan as approved in writing by EPA and in accordance with the schedule approved by EPA.

d. The Respondent will provide progress reports on the 10<sup>th</sup> of each month that will initiate upon mobilization to the site and shall detail the progress made to date, the actions anticipated for the next reporting period, and any problems encountered.

e. Within 90 days of the completion of the removal action, the Respondent will provide a draft final report to EPA detailing the actions taken. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled “OSC Reports.” The final report shall include a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (*e.g.*, manifests, contracts, and permits). The EPA representative shall approve the

report format in advance. The final report incorporating EPA comments shall be submitted within 30 days from the time the Respondent receives the EPA comments on the draft final report. The report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

“Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete.

I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

39. All hazardous substances, oil, pollutants or contaminants removed off-site pursuant to this Order for treatment, storage or disposal shall be treated, stored, or disposed of at a facility in compliance, as determined by U.S. EPA, with the U.S. EPA Revised Off-Site Rule, 40 CFR ' 300.440, 58 Federal Register 49215 (Sept. 22, 1993). Prior to any off-site shipment, Respondents shall provide written notification to the OSC and the appropriate State offices of such shipment.

#### IX. SITE ACCESS

40. If the Site, or any property where access is needed to implement this Order, is owned or controlled by the Respondent, the Respondent shall, commencing on the Effective Date, provide EPA, and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

41. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use their best efforts to obtain all necessary access agreements or modifications to existing access agreements within 15 days after approval of the Work Plan, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, “best efforts” include the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing their efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney’s fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

42. Notwithstanding any provision of this Order, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, CWA, RCRA, and any other applicable statutes or regulations.

## **X. ACCESS TO INFORMATION**

43. Respondent shall provide to EPA and TCEQ, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA and TCEQ, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

44. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA and TCEQ under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and TCEQ, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

45. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent asserts such a privilege in lieu of providing documents, they shall provide EPA and TCEQ with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

46. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **XI. RECORD RETENTION**

47. Until 6 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until 6 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

48. At the conclusion of this document retention period, Respondent shall notify EPA and TCEQ at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or TCEQ, Respondent shall deliver any such records or documents to EPA.

49. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

50. The Respondent hereby certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XII. COMPLIANCE WITH OTHER LAWS**

51. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order

shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (“ARARs”) under federal environmental or state environmental or facility siting laws. Respondent shall identify ARARs in the Work Plan subject to EPA approval.

### **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

52. In the event of any action or occurrence during performance of the Work, which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or, in the event of his/her unavailability, the Regional Duty Officer of the EPA Region 6 Emergency Response and Prevention Branch, at the EPA Regional Emergency 24-hour telephone number 866-372-7745, to thus inform the Agency of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

53. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC at 866-372-7745 and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

### **XIV. AUTHORITY OF ON-SCENE COORDINATOR**

54. The OSC shall be responsible for overseeing Respondent’s implementation of this Order. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other removal action undertaken at the Site by the Respondent, EPA, or any other party. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

### **XV. PAYMENT OF RESPONSE COSTS**

#### **55. Payment of Past Response Costs**

a. Respondent shall pay to EPA \$120,078.52 for Past Response Costs. Such past response costs were incurred by the United States in connection with the Site from October 1, 1980, to August 31, 2003. Within 30 days after the Effective Date of this Order, the Respondent shall pay the Past Response Costs. The total amount of Past Response Costs shall be deposited in the Falcon Refinery Site Special Account #1 within the EPA Hazardous Substances Superfund. The deposit of these costs in the Falcon Refinery Site Special Account #1 shall be retained and used to conduct oversight at the Site.

b. Payment into Falcon Refinery Site Special Account #1 shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with EFT instructions provided by EPA, or by submitting a certified check. Certified checks should be made payable to "Falcon Refinery Site Special Account #1" and should reference "Hazardous Substances Superfund", the "Falcon Refinery Site, Ingleside, San Patricio County, Texas", EPA Region 6, Site/Spill ID Number "06MC", and "EPA Docket Number 06-04-04." Checks should be forwarded to:

EPA Superfund - Falcon Refinery Site Special Account #1(06MC)  
 CERCLIS TXD086278058  
 Superfund Accounting  
 P.O. Box 371099M  
 Pittsburgh, Pennsylvania 15251  
 ATTN: COLLECTION OFFICER FOR SUPERFUND

c. Respondent shall submit notice of payment including a copy of the EFT transmittal documentation or check to the EPA OSC and to:

Chief, Superfund Cost Recovery Section (6SF-AC)  
 U.S. Environmental Protection Agency, Region 6  
 1445 Ross Avenue  
 Dallas, Texas 75202-2733

d. In the event that the payment of the amount specified in Paragraph 55a is not made within 30 days after the Effective Date of this Order, Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the 30<sup>th</sup> day after the Effective Date of this Order and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

## 56. Payments for Future Response Costs

a. Respondent shall pay to EPA all Future Response Costs not inconsistent with the NCP. The total estimated Future Response Costs is \$99,993. Initially, Past Response Costs paid into the Falcon Refinery Site Special Account #1 will fund Future Response Costs; oversight costs will be drawn against the account.

b. On a periodic basis the United States will send Respondent a bill requiring payment that includes an EPA Integrated Financial Management System ("IFMS") Itemized Cost Summary (Scorpis Report). The Respondent shall make all payments within 30 days of Respondent's receipt of each bill. Respondent shall make all payments required by this Paragraph in accordance with EFT instructions provided by EPA, or by a certified or cashier's check. Checks shall be made payable to the Falcon Refinery Site Special Account #1 and should reference "Hazardous Substance Superfund", the "Falcon Refinery Site, Ingleside, San Patricio County, Texas", EPA Region 6, Site/Spill ID Number "06MC", and "EPA Docket Number 06-04-04." Checks should be forwarded to:

EPA Superfund - Falcon Refinery Site Special Account #1 (06MC)  
 CERCLIS TXD086278058  
 Superfund Accounting  
 P.O. Box 371099M  
 Pittsburgh, Pennsylvania 15251  
 ATTN: COLLECTION OFFICER FOR SUPERFUND

c. Respondent shall submit notice of payment including a copy of the EFT transmittal documentation or check to the EPA OSC and to:

Chief, Superfund Cost Recovery Section (6SF-AC)  
 U.S. Environmental Protection Agency, Region 6  
 1445 Ross Avenue  
 Dallas, Texas 75202-2733

d. Whenever Falcon Refinery Site Special Account #1 is drawn down to a balance of approximately \$50,000, EPA will send notice to the Respondent. The Respondent shall, within twenty (20) days of receipt of a notice and the Scorpis Report or its equivalent, remit to the Falcon Refinery Site Special Account #1 (by EFT, certified check, or cashier's check) the amount EPA identifies as necessary to replenish the Falcon Refinery Site Special Account #1 to a balance of \$120,078.52. If Falcon Refinery Site Special Account #1 is depleted to an amount of \$10,000 or less at the time EPA submits a notification and Scorpis Report to the Respondent, the Respondent shall pay, within ten days of EPA's notice, \$40,000 to Falcon Refinery Site Special Account #1. The Respondent shall remit the remaining amount to replenish Falcon Refinery Site Special Account #1 to \$120,078.52. The Respondent shall make such payments according to the procedures described in Paragraph 56(b). Neither dispute resolution nor a



request to the OSC for more detailed information nor a request for a certified cost accounting shall delay the date that the Respondent's payments are due under this paragraph.

e. In the event that payment for Future Response Costs is not made within 30 days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The interest rate is 1.27 percent which is compounded annually and subject to change on October 1 every year. The Interest on Future Response Costs shall begin to accrue from the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

f. Respondent may dispute all or part of a bill for Future Response Costs submitted under this Order, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, the Respondent shall pay the full amount of the uncontested costs to EPA as billed on or before the due date. Within the same period, the Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in Paragraphs 55 (b) and (c) above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus Interest within 60 days after the dispute is resolved.

#### **XVI. DISPUTE RESOLUTION**

57. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order.

- a. The Parties should first attempt to resolve any disagreements concerning this Order expeditiously and informally. Whenever possible, the OSC and the Project Coordinator are to operate by consensus.
- b. If the OSC and the Project Coordinator cannot resolve a dispute within 24 hours, or if Respondent objects to an EPA notice of deficiency or any other decision made by EPA under this Order, Respondent may submit to EPA's OSC a written notice of objection within 14 days of receipt of EPA's notice or decision. EPA's receipt of Respondent's written objection begins the Negotiation Period, the period of formal negotiations concerning the dispute. Respondent's written objection must define the issue in dispute and state the basis of Respondent's objections. EPA then has 21 days to provide Respondent with a written response addressing Respondent's objections. EPA and Respondent then have an additional 14 days to reach agreement on the issue in dispute.

- c. If an agreement is not reached within 14 days after EPA provides Respondent with a written response to Respondent's written objections, Respondent may request a determination by EPA's Chief of the Response and Prevention Branch of the Superfund Division, EPA Region 6 ("Branch Chief"). The Branch Chief's determination will be in writing. Within two days of receiving the Branch Chief's determination, Respondent may request a review by the Director of the Superfund Division, EPA Region 6 ("Division Director") of any determination made by the Branch Chief. The Division Director's decision is EPA's final decision. Respondent may request that prior to the determination by the Branch Chief that Respondent be permitted to present their issues to the Branch Chief. Respondent must proceed in accordance with EPA's final decision regarding the matter in dispute, regardless of whether Respondent agrees with the decision. If Respondent does not agree to perform or does not actually perform the work in accordance with EPA's final decision, EPA reserves the right in its sole discretion to conduct the work itself, to seek reimbursement from Respondent, to seek enforcement of the decision, to seek stipulated penalties, and to seek any other appropriate relief.
- d. EPA will consider all objections, responses, and determinations for inclusion in the administrative record, in accordance with 40 C.F.R. § 300.810.

~~58.~~ While a matter is pending in dispute resolution, Respondent is not relieved of its obligations to perform and conduct non-disputed activities and submit non-disputed deliverables on the schedule set forth in the work plan. The invocation of dispute resolution does not stay the accrual of stipulated penalties under this Order.

59. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Order.

## **XVII. FORCE MAJEURE**

60. Respondent agrees to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance.

61. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within 24 hours of when Respondent first knew that the event might cause a delay. Within 5 days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

62. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

### **XVIII. STIPULATED PENALTIES**

63. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in this Paragraph for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

#### **64. Stipulated Penalty Amounts**

The following stipulated penalties shall accrue per violation per day for any non-compliance with this Order:

<u>Penalty Per Violation Per Day</u>	<u>Period of Non-compliance</u>
\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$1000	8 <sup>th</sup> through 14 <sup>th</sup> day
\$1750	15 <sup>th</sup> day and beyond

65. a) In the event that the EPA assumes performance of a portion or all of the Work pursuant to Paragraph 76 of Section XX, Respondent shall be liable for a stipulated penalty in the amount of \$200,000.

b) For each failure to cease activity when the EPA OSC or EPA-designated site representative orders either an oral or written cessation or halt of activities pursuant to Paragraph 54 of this Order (Authority of the On-Scene Coordinator), the Respondent shall pay a stipulated penalty of \$27,500 per day.

66. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the Division Director, under Paragraph 57(c) of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the Division Director issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

67. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraphs regardless of whether EPA has notified Respondent of a violation.

68. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," and should reference the "Falcon Refinery Site, Ingleside, San Patricio County, Texas", EPA Region 6, Site/Spill ID Number "06MC", and "EPA Docket Number 06-04-04, and the name and address of the party (ies) making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 55.

69. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Order.

70. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision. Notwithstanding any other provisions, no penalty shall accrue or be due and payable when a dispute is resolved in Respondent's favor by agreement or otherwise.

71. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 67. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 74. Notwithstanding any other provision of this Section, EPA may, in its un-review-able discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

72. Respondent may dispute EPA's right to penalties by invoking the dispute resolution procedures under Section XVI. Penalties will accrue but need not be paid during the dispute resolution period. If Respondent does not prevail upon resolution, all penalties are due to EPA within 30 days of resolution of the dispute. If Respondent prevails upon resolution, the penalties at issue in the dispute resolution need not be paid. EPA in its discretion may forgive all or part of any stipulated penalties under this Order.

#### **XIX. COVENANT NOT TO SUE BY EPA**

73. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of Section XV of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the Past Response Costs due under Section XV of this Order and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII of this Order. This covenant not to sue is

conditioned upon the complete and satisfactory performance by Respondent of their obligations under this Order. This covenant not to sue extends only to Respondent and does not extend to any other person.

## **XX. RESERVATIONS OF RIGHTS BY EPA**

74. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

75. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Order;
- b. liability for costs not included within the definition of Past Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

76. Work Takeover.

In the event EPA determines that Respondent has ceased implementation of any major portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXI. COVENANT NOT TO SUE BY RESPONDENT**

77. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, or this Order, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State of Texas Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

78. Except as provided in Paragraph 80 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 75 (b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

79. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

80. Respondent agrees not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous

substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if:

a. The materials contributed by such person to the Site containing hazardous substances did not exceed the greater of, i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.

## **XXII. OTHER CLAIMS**

81. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

82. Except as expressly provided in Section XIX, (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

83. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

## **XXIII. CONTRIBUTION PROTECTION**

84. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Order. The “matters addressed in this Order” are the work performed by Respondent under the requirements of the Order and Past Response Costs and Future Response Costs which are specified to be paid by Respondent pursuant to this Order. Respondent is not released from liability, if any, for any costs not paid by Respondent pursuant to this Order, or for response



actions beyond the scope of this Order regarding the remedial investigation and feasibility study proposed for this site, and other activities arising pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c). Except as provided in Section XXI, Paragraph 77 of this Order, nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery.

#### **XXIV. INDEMNIFICATION**

85. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, their officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

86. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

87. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

#### **XXV. INSURANCE**

88. At least 7 days prior to commencing any on-Site work under this Order, Respondent shall require contractors to secure, and maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of one million

dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance. In addition, for the duration of the Order, Respondent shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Order. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

## **XXVI. FINANCIAL ASSURANCE**

89. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security in the amount of \$500,000 dollars in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Respondent; or
- e. A demonstration that the Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

90. If the Respondent seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 89 (a) of this Section, Respondents shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If the Respondent seeks to demonstrate their ability to complete the Work by means of the financial test on the corporate guarantee pursuant to Paragraph 89 (d) or (e) of this Section, they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, the Respondent shall, within 30 days of receipt of notice of EPA's determination obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 89 of this Section. The Respondent's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Order.

91. If, after the Effective Date, the Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 89 of this Section, the Respondent may, on any anniversary date of the Effective Date, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. The Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, the Respondent may reduce the amount of the security in accordance with the written decision resolving the dispute.

92. The Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, the Respondent may change the form of the financial assurance only in accordance with the written decision involving the dispute.

## **XXVII. MODIFICATIONS**

93. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

94. If Respondent seeks permission to deviate from any approved work plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC. If issues arise in the field and the OSC is at the Site, then Respondent may contact the OSC and discuss deviations of the work plan. If the OSC agrees to the deviation, the action may take place and the approval will be documented and become a part of the work plan. The Respondent shall submit a letter to EPA documenting the decision reached between the Respondent and the OSC.

95. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

**XXVIII. NOTICE OF COMPLETION OF WORK**

96. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, the EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order.

**XXIX. DISCLAIMER**

97. By signing this Order and taking actions under this Order, Respondent does not admit, adopt, or concede EPA's Findings of Fact or Conclusions of Law, nor does it acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment. Respondent reserves the right to contest the Findings of Fact and Conclusions of Law in any proceeding regarding the Site other than an action brought by the United States to enforce this Order. Further, the participation of Respondent in this Order may not be considered an admission of liability and is not admissible in evidence against Respondent in any judicial or administrative proceeding, other than a proceeding brought by the United States to enforce this Order or a judgment relating to it. Respondent agrees not to contest the validity or terms of this Order, or the procedures underlying or relating to it, in any action brought by the United States to enforce its terms. Respondent retains its rights to assert claims against other potentially responsible parties at the Site under Section 113 of CERCLA, 40 U.S.C. § 9613.

**XXX. SEVERABILITY/INTEGRATION/APPENDICES**

98. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

99. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order.

### **XXXI. PUBLIC COMMENT**

100. This Order shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122 (i) (3) of CERCLA, EPA may modify or withdraw its consent to this Order if comments received disclose facts or considerations which indicate that this Order is inappropriate, improper or inadequate.

### **XXXII. EFFECTIVE DATE**

101. The effective date of this Order shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 100 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Order.

The undersigned representative of Respondent certifies that they are fully authorized to enter into the terms and conditions of this Order and to bind the party whom they represent.

It is so ORDERED and Agreed this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

\_\_\_\_\_  
National Oil Recovery Corporation

\_\_\_\_\_  
Print Name of Signatory and Title

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

\_\_\_\_\_  
Samuel Coleman, P.E., Director  
Superfund Division

U.S. Environmental Protection Agency  
Region 6

EFFECTIVE DATE: \_\_\_\_\_  
\_\_\_\_\_